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90-967

NO. 90-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

GUY WOODDELL, JR.,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 71, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS For the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is a union member who sues his union and its officials for violations of his free speech rights under Title I of the Labor Management Reporting and Disclosure Act, and who seeks punitive and compensatory damages, entitled to a trial by jury under the Seventh Amendment?

II. Does federal law permit a union member to sue to enforce his union's constitution, and, if so, does Section 301 of the Labor Management Relations Act govern the interpretation of the union constitution and require the application of uniform principles of federal law to determine the meaning of the union constitution and the remedies available for its violation?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner, Guy Wooddell, and Respondents, International Brotherhood of Electrical Workers, Local Union No. 71 (hereinafter, "Local 71"), R.L. "Buck" Wooddell (hereinafter, "Respondent, Wooddell"), and Gregory Sickles (hereinafter, "Respondent, Sickles").

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Guy Wooddell, Jr. petitions the Court to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit which affirmed the denial of Petitioner's right to a jury trial on his free speech claims and the dismissal of Petitioner's breach of contract claims.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is repro-

duced at pages A-1 to A-21 of the Appendix ("App. A-1 to A-21"). The order of the court of appeals denying rehearing is reproduced at App. A-22. The opinions of the United States District Court for the Southern District of Ohio are reproduced at App. A-24 to A-36, A-37 to A-41, and A-42 to A-63.

JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Sixth Circuit issued its opinion on June 27, 1990. That court denied the Petition for Rehearing on September 4, 1990. App. A-22. One extension of time in which to file this Petition was granted by the Honorable Justice John Paul Stevens on November 26, 1990 extending the time for filing until December 13, 1990.

This Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The Seventh Amendment to the United States Constitution:

Trial by jury in civil cases

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185:

Suits by and against labor organization

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the

United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent - Entity for purposes of suit - Enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his

acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Section 101 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. Section 411:

Bill of Rights; constitution and bylaws of labor organizations

(a)(1) Equal Rights. Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such organization's constitution and bylaws.

(2) Freedom of speech and assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express

any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, initiation fees, and assessments. Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date

of enactment of this Act [enacted Sept. 14, 1959] shall not be increased, and no general or special assessment shall be levied upon such members, except -

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each

local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: Provided, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of the right to sue. No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as

defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (not not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, ex-

pelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b)(1) Invalidity of constitution and bylaws. Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

Section 101 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. Section 412:

Civil action for infringement of rights; jurisdiction Any person whose rights secured by the provisions of this title [29 U.S.C. Sec. 411, et seq.] have been infringed by any violation of this title [29 U.S.C. Sec. 411, et seq.] may bring a

civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Petitioner, Guy Wooddell, Jr., is a member in good standing of Respondent, International Brotherhood of Electrical Workers, Local Union No. 71. Respondent, Buck Wooddell was, at all relevant times, the President of Local 71. Respondent, Gregory Sickles has been the Business Manager of Local 71 since October 14, 1985.[1]

1. Petitioner, Guy Wooddell, Jr., and Respondent, Buck Wooddell, are also brothers.

This dispute concerns the treatment of Petitioner by the Respondents. The trouble between the parties became apparent in January 1986 when Petitioner openly opposed an announced union dues increase. In previous years, Petitioner had been opposed to the selection of Respondent, Sickles as the business manager of the local and to the selection of other officers as well. After hearing of Petitioner's outspoken opposition to the dues increase, Respondent, Wooddell telephoned Petitioner. The conversation quickly became hostile. Respondent, Wooddell told Petitioner that if he persisted in his opposition to the dues increase, he would be "finished" in the union.

Shortly after this conversation, Respondent, Wooddell filed internal union charges against Petitioner. On February 24, 1986 Local 71 sent Petitioner a notice informing him that he was to appear at a

hearing before the board on March 14, 1986.

On March 14, 1986 Petitioner, after consulting an attorney, appeared before the board without counsel. At the hearing, the charges were read. Afterward, Petitioner was asked if he were guilty of the charges. He said no. The two brothers then began shouting at each other and Petitioner left. No decision was ever rendered on the charges.

After Petitioner's opposition to the dues increase, Respondents discriminated against him with respect to job referrals. Local 71 operated a hiring hall referral system. The referral system operated by priority groups.

Under the referral procedures, each member is to be registered in the highest priority group in the classification for which he qualifies. Petitioner fulfilled the requirements of the highest priority

group for Journeymen Linemen, known as Group I. Members are supposed to be referred to work in the order in which they signed up on the out of work list. Group I members are to be referred out before any Group II members. Group II members are to be referred out before any Group III members, and so on down the line.

Members who were qualified only for a lower priority group, or who were not ahead of Petitioner on the out of work list were referred to employers for employment before Petitioner. Petitioner continued not to be referred out for work. It is his contention that the reason for this lack of referrals was his outspoken opposition to the dues increase. After the complaint was filed in this case, Petitioner received a couple of referrals. However, these were for much lower paying jobs with far less desirable working conditions than the referrals received by

those who did not oppose the dues increase.

No attempts were made to refer Petitioner to another job by Local 71 until January 19, 1987, well after this action had been filed. By that time, he had already committed himself to a job in New Jersey. He had obtained that job himself.

B. PROCEEDINGS IN THE DISTRICT COURT

Petitioner brought suit on July 25, 1986 under Title I of the Labor Management Reporting and Disclosure Act (LMRDA, 29 U.S.C. Sec. 411 et seq.), Section 301 of the Labor Management Relations Act (LMRA, 29 U.S.C. Sec. 185), 28 U.S.C. Sec. 1331, and the pendent powers of the District Court.

Petitioner alleged that 1) he engaged in internal union political activities protected by the Bill of Rights of the Labor Management Reporting and Disclosure Act (29 U.S.C. Sec. 411, et seq.) and was

economically discriminated against and disciplined in retaliation for such activity; 2) Respondents' conduct violated the Constitution of the International Brotherhood of Electrical Workers, including the requirements for substantive and procedural protections to be afforded to members against whom internal union charges have been filed and the requirement that local unions live up to the terms of their collective bargaining agreements with employers, thus amounting to a breach of contract under either Sec. 301 of the Labor Management Relations Act (29 U.S.C. Sec. 185) or state law; and 3) Respondents' actions amounted to intentional interference with Petitioner's contractual relations in violation of state law.[2] Peti-

2. There was also a breach of the duty of fair representation claim in this case that was dismissed, but not pursued on appeal.

tioner sought injunctive relief, lost wages, lost fringe benefits, compensatory damages, punitive damages, and reasonable attorneys fees. Petitioner demanded a jury trial.

Petitioner's case was dismissed without trial by the district court in piecemeal fashion. He was also denied the right to a jury trial. First, on March 21, 1988, the district court dismissed Petitioner's Sec. 301 breach of contract claims. App. A-33 to A-36. Second, on August 29, 1988, the district court, in an in chambers decision, denied Petitioner the right to a jury trial on his LMRDA claims. App. A-39 to A-40. Third, on October 19, 1988, the district court dismissed Petitioner's LMRDA free speech claims. App. A-58 to A-62. As a result of these orders, Petitioner's entire case was dismissed without a trial.

C. PROCEEDINGS IN THE COURT OF APPEALS

The Court of Appeals for the Sixth Circuit affirmed in part and reversed in part on June 27, 1990. App. A-1 to A-21. In this decision, the court reversed the district court's dismissal of Petitioner's claim that he was deprived of work in retaliation for his outspoken opposition to the dues increase, which was premised upon LMRDA. The court of appeals affirmed the district court's rulings in all other respects. Thus, the court of appeals determined that Petitioner enjoyed no right to a jury trial. The court relied exclusively upon its prior decision in McCraw v. United Ass'n of Journeymen, 341 F.2d 705, 709 (6th Cir. 1985) to reach that conclusion.

The court also determined that Petitioner had no right to pursue a federal claim under Section 301 of LMRA for Local 71's violations of the union constitution.

The court of appeals was cognizant of this Court's decision in United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada v. Local 334, 452 U.S. 615 (1981). However, the court chose to strictly adhere to its prior decision in Trail v. Int'l Brotherhood of Teamsters, 542 F.2d 961, 968 (6th Cir. 1976) in rendering its determination on this issue.

At the same time, the court held that claims brought under union constitutions are exclusively the creatures of federal law. As such, the court determined that pendent state claims may not be a vehicle for resolving such disputes. On September 4, 1990 the court of appeals denied Petitioner's Petition for Rehearing. App.A-22.

REASONS RELIED ON FOR ALLOWANCE OF A WRIT

I. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH THE DECISIONS OF SEVERAL OTHER COURTS OF APPEAL AND WITH RECENT DECISIONS OF THIS COURT AND DECIDES AN

IMPORTANT ISSUE OF FEDERAL LAW WHICH HAS NOT, BUT SHOULD BE, DECIDED BY THIS COURT.

A writ of certiorari should be granted in this case because, in several respects, the court below decided federal questions in a way which directly conflicts with the decisions of several other courts of appeals. It also is in conflict with a recent decision of this Court. Moreover, the questions presented here - the right to a jury trial in free speech cases under LMRDA and the right of members to sue under uniform principles of federal law to enforce their union constitution - are important questions of federal law that should now be resolved by this Court.

A. THE JURY TRIAL ISSUE.

In denying Petitioner a jury trial on his claim for employment related retaliation under LMRDA, the lower courts relied exclusively upon McCraw v. United Assoc. of Journeymen, 341 F.2d 705, 709 (6th Cir.

1965). The decision of the court of appeals affirmed the district court's decision on this issue seeing "no reason to disturb McCraw." App. A-20.

Every other Circuit which has considered the specific issue of a right to a jury trial under LMRDA disagrees with the view of the Sixth Circuit as expressed in McCraw and reaffirmed in this case. Quinn v. DiGuilian, 739 F.2d 637, 645-46 (D.C. Cir. 1984); Feltington v. Motion Picture Operators Local 306, 605 F.2d 1251, 1257 (2d Cir. 1979), cert. den. 446 U.S. 943 (1980); Simmons v. Avisco, Local 713, 350 F.2d 1012, 1018 (4th Cir. 1985); Int'l Brotherhood of Boilermakers v. Braswell, 388 F.2d 193 (5th Cir. 1968), cert. den. 391 U.S. 935 (1968).

This split in the Circuits should now be resolved by this Court. This is a question which requires the Seventh Amendment to the United States Constitution to be

properly interpreted. It involves a statute which codifies the national interest in protecting a union member's free speech rights. Reed v. United Transportation Union, __U.S.___, 109 S.Ct. 621, 630 (1989).

While the Court has not specifically decided whether an LMRDA plaintiff has a right to a jury trial, it has recently addressed the right to a jury trial in a very similar context. Teamsters Local 391 v. Terry, 494 U.S. ____, 100 S.Ct. 1339, 108 L.Ed.2d 519 (1990). As Petitioner now argues, the analytical framework for determining whether there is a right to a jury trial which the Court employed in Terry, but which the lower courts ignored in favor of prior circuit precedent, plainly establishes the right to a jury trial in LMRDA cases. The implicit conflict between the decision below and Terry is another reason why review should be granted.

Terry presented the question of whether an employee who seeks relief in the form of back pay for a union's alleged breach of its duty of fair representation in a hybrid Section 301 LMRA case has a right to a jury trial. The Court noted that "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." Terry, supra, 110 S.Ct. at 1345, citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959); and Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

In Terry, the Court analyzed the issue in terms of whether the particular action would resolve legal rights. To make such a determination, the Court employed the traditional two-part test:

> "First, we compare the statutory action to 18th century actions brought in the courts of England prior to the merger of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature."

> Tull v. United States, 481 U.S. 412, 417-418 (1987) (citations omitted). The second inquiry is more important in our analysis.[3] Granfinaciera, S.A. v. Nordberg, 492 U.S. ____, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989).
>
> Terry, supra, 110 S.Ct. at 1345.

In answering the first inquiry referred to as "preliminary," the Court analogized the breach of the duty of fair representation action to a claim by a trust beneficiary against his trust. The Court found that the Terry plaintiffs' action encompassed both legal and equitable issues. The instant case certainly encompasses legal issues. It is, perhaps, arguable that it may also encompass equitable issues. As

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3. Justice Brennan's concurring opinion in Terry argues that the time has come to dispense with historical inquiry altogether. He would decide Seventh Amendment questions solely on the basis of the relief sought.

Terry teaches us, that potential duality clearly should not deprive Petitioner of the guarantees of the Seventh Amendment.

In Reed v. United Transportation Union, ___ U.S. ____, 109 S.Ct. 621 (1989), the Court looked at Title I of LMRDA for the purpose of determining the proper statute of limitations to apply to such actions. The Court found that:

> Because Sec. 101(a)(2) protects rights of free speech and assembly, and was patterned after the First Amendment, it is readily analogized for the purpose of borrowing a statute of limitations to state personal injury actions. Id. 109 S.Ct. at 626.

Certainly, a personal injury action is the type of action that could have been brought in a court of law in 19th century England. Thus, whether classified as a trust action as in Terry or as a personal injury action as in Reed, the claims raised herein give rise to the protections of the Seventh Amendment.

The second and most important part of this Court's inquiry in Terry focused on the nature of the remedy sought. The Terry plaintiffs sought compensatory damages, representing back pay and benefits. This Court found that:

> The back pay sought by respondents is not money wrongfully held by the union, but wages and benefits they would have received from McClean had the union processed the employees' grievance properly.
>
> Terry, supra, 110 S.Ct. at 1348.

This is precisely the type of relief that the Petitioner seeks in this case. His assertion of a right to a jury trial is made even stronger by virtue of his request for compensatory and punitive damages. In Terry, this Court found that the remedy of back pay was legal in nature and that Plaintiffs were entitled to a jury trial under the Seventh Amendment. Id, 110 S.Ct. at 1349. A similar result should ensue in this case.

The analytical framework enunciated in Terry is equally applicable to this case. The court of appeals decision conflicts with the Terry analysis. In contrast to Terry, the Sixth Circuit decided, in McCraw and in the instant case, that there was no right to a jury trial because a free speech LMRDA case is a statutory claim which was not specifically recognized at common law when the Seventh Amendment was enacted. McCraw, supra at 709. The court made no attempt to compare the LMRDA claim to traditional common law claims. The court also failed to determine whether the remedy sought was legal or equitable in nature. The analysis employed by the court of appeals directly contradicts that which was enunciated in Terry.

For all of the above reasons, Petitioner is entitled to a jury trial on his LMRDA claims. The lower court decision overlooked and/or misapprehended the above

specified law. A writ of certiorari should be granted to address the important issue of a right to a jury trial in cases such as this, particularly in light of the split between the Circuits and this Court's determination in Terry.

B. THE ENFORCEMENT OF UNION CONSTITUTIONS.

The decision below effectively holds that union members have no way of enforcing their union constitutions, under either state or federal law. Thus, the courts held both that union constitutions may not be enforced under Section 301 of the LMRA, and that such constitutions may not be enforced under state contract law. Certiorari should also be granted to consider whether federal law allows members to bring such actions and, if so, whether the enforcement of union constitutions should be governed by federal law.

Both of the lower courts relied on Trail v. Teamsters, 542 F.2d 961, 968 (6th Cir.

1976) where the Sixth Circuit had held, in disagreement with several other circuits, that members may not sue to enforce a union constitutional requirement requiring collective bargaining agreements to be ratified by the union membership.

The continuing viability of Trail has been called into serious question by virtue of this Court's decision in United Ass'n. of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada v. Local 334, 452 U.S. 615 (1981). In Journeymen, supra at 622, this Court held that a union constitution is a contract between labor organizations within the meaning of Section 301 of LMRA (29 U.S.C. Sec. 185). As a consequence, suits between labor organizations for the enforcement of the constitution are within the jurisdiction of the federal courts, and the substantive law to be applied in such suits is federal law.

As the lower court noted, in Journeymen this Court chose not to specifically decide whether an individual union member may sue his union for violating the union constitution. (See Journeymen, supra, at 627, n.16.) Most of the decisions of the courts of appeal which have considered this issue have held, contrary to the decision below, that union members, as well as union entities, may sue to enforce union constitutions under Section 301. Lewis v. Int'l Brotherhood of Teamsters, Local 771, 826 F.2d 1310 (3d Cir. 1987); Kinney v. Int'l Brotherhood of Electrical Workers, 669 F.2d 1222, 1229 (9th Cir. 1981); Pruitt v. Carpenters Local Union No. 225, 893 F.2d 1216, 1218-19 (11th Cir. 1990); DeSantiago v. Laborers Int'l Union, Local 1140, 914 F.2d 125 (8th Cir. 1990); see also Abrams v. Carrier Corp., 434 F.2d 1234 (2d Cir. 1970).

However, a number of courts still follow a rule similar to that enunciated by the Sixth Circuit in Trail, finding such suits to be outside the parameters of Sec. 301. Parks v. Int'l Brotherhood of Electrical Workers, 314 F.2d 886 (4th Cir. 1963), cert. den. 372 U.S. 976 (1963); Adams v. Int'l Brotherhood of Boilermakers, 262 F.2d 835 (10th Cir. 1958).

The Fifth Circuit has taken yet another view requiring that there be a "significant impact" upon labor relations before such suits may be recognized under Sec. 301. Alexander v. Int'l Union Operating Engineers, 624 F.2d 1235, 1238 (5th Cir. 1980).

The district courts have had a difficult time grappling with this issue. Several cases have held that a union member may sue his union under Sec. 301 for violations of the union constitution. Doby v. Safeway Stores, Inc., 523 F.Supp. 1162,

1166 (E.D. Va. 1981); Davis v. American Postal Workers Union, 582 F.Supp. 1574 (S.D. Fla. 1984); Legutko v. Local 816 Int'l Brotherhood of Teamsters, 606 F. Supp. 352 (E.D. N.Y. 1985); National Association of Basketball Referees v. Middleton, 688 F. Supp. 131 (S.D. N.Y. 1988); Fraser v. James, 655 F.Supp. 1073 (D. Vir. Isl. 1987); Skipper v. Hoff and Assoc., 684 F.Supp. 707 (S.D. Ga. 1987); Gable v. Local Union No. 387, 695 F.Supp. 1174 (N.D. Ga. 1988). However, other district court decisions have agreed with the opposite view. Frenza v. Sheet Metal Worker Ass'n., 567 F.Supp. 580, 585 (E.D. Mich. 1983); Werner v. McLean Trucking Co., 627 F.Supp. 203 (S.D. Oh. 1985); Petrowski v. Kilroy, 609 F. Supp. 220 (E.D. Pa. 1985); Finnie v. District No. 1 - Pacific Coast Dist., Etc., 538 F.Supp. 455 (N.D. Cal. 1981)

In this case, the court of appeals chose not to analyze the impact of Journeymen upon Trail, relying instead upon this Court's decision not to decide the specific issue now before this Court, i.e., whether or not Sec. 301 of LMRA allows for suits by union members against their union for alleged violations of the constitution. (Journeymen, supra at 627, n.16.) That specific issue was not before this Court in Journeymen. It is now before this Court and ought to be squarely addressed.

There are three reasons why the decision below cannot be reconciled with this Court's decisions under Section 301 and, in particular, with the analysis of Journeymen. First, this Court has long recognized that an individual union member can enforce his rights under Section 301 contracts. Smith v. Evening News Ass'n. 371 U.S. 195 (1962). There is no reason on the face of the statute or under the princi-

ples of federal labor law why an individual employee should be permitted to sue to enforce an agreement between a labor organization and an employer, but not an agreement between two labor organizations. Thus, read together, Smith and Journeymen strongly suggest that a union member's suit alleging violations of a union constitution is actionable under Sec. 301.[4]

The second reason why the decision below is inconsistent with Journeymen is

4. After all, Sec. 301 applies to all "suits for violations of contracts between an employer and a labor organization affecting commerce ... or between any such labor organizations." This Court has "not taken a restrictive view of who may sue under Sec. 301 for violations of such contracts." Franchise Tax Bd. v. Laborers Vacation Trust, 463 U.S. 1, 25, n. 28 (1983).

that suits seeking to enforce union constitutions involve issues of labor law and labor relations that "peculiarly call(s) for uniform law." Teamsters Local v. Lucas Flour, 369 U.S. 95, 103 (1962). This case involves violations of the constitution of an international union. It would certainly seem desirable from a policy perspective to have adjudications involving such issues made uniformly in the federal courts rather than haphazardly in the courts of all fifty (50) states. Such uniformity would be consistent with long established principles in the area of labor relations law.

This Court has observed that in cases involving union constitutions, "the substantive law to be applied 'is the federal law, which the courts must fashion from the policy of our national labor laws'." Journeymen, supra at 627, citing Textile Workers v. Lincoln Mills, 353 U.S. 448,

456 (1957). This policy should be applied in this case.

Third, in light of this Court's holding in Journeymen that union constitutions are enforceable under Section 301 when a union is a plaintiff, the effect of holding that they are not enforceable under Section 301 when an individual member is a plaintiff will be that the applicability of federal law principles, and federal jurisdiction, will depend on the identity of the plaintiff.

The inevitable result of this holding will be that the same clause of the same constitution may be given different meanings, depending on the identity of the plaintiff in a particular case. For the same reasons, the remedies for the same sort of violation of any given provision will also be different, depending on who happens to be the plaintiff. Consequently, those who seek to enforce a union consti-

tution could shop for the most favorable forum by the simple ruse of manipulating the plaintiffs in whose name contract enforcement is sought, thus enabling the action to be brought in state court under state law, or in federal court under federal law. The possibility of differing meanings and remedies, based on the identity of the plaintiff and, thus, the choice of forum, would create an intolerable uncertainty about the meaning and effect of union constitutions that would surely undermine stable labor relations.

In summary, since Journeymen was decided, the lower courts have continued to struggle with the question of whether union members should be able to sue under federal law to enforce union constitutions. Because the Sixth Circuit has decided to adhere to Trail, it is apparent that the Court will need to resolve the controversy. The issue has surely ripened

sufficiently by now to warrant the Court's resolution of the question. Moreover, the continuing uncertainty about the meaning of union constitutions that is produced by the availability of different forums and the application of different legal principles makes this an extremely important question of federal law that ought to be decided by this Court.

C. EVEN IF A UNION MEMBER HAS NO FEDERAL REMEDY UNDER SECTION 301 FOR VIOLATIONS OF HIS UNION'S CONSTITUTION, FEDERAL LAW DOES NOT BAR ASSERTION OF A STATE LAW REMEDY FOR SUCH VIOLATIONS

Petitioner's complaint included pendent state claims for breach of contract and intentional interference with contractual relations. The contract on which those claims are based is the constitution of the International Brotherhood of Electrical Workers.

The court of appeals decision affirmed the district court's dismissal of these

claims. App. A-11 to A-13. The court of appeals found that such claims are the subject of federal labor law. As such, state actions are not the proper vehicle for settling disputes between a union and its members. However, the court of appeals also held that union constitutions are not contracts between the member and his union. As such, the court of appeals found that state suits are also not appropriate. If there was a contract, said the court of appeals, the suit would be preempted under Section 301 of LMRA. App. A-15.

Assuming arguendo that Trail is still good law, as indicated by the court of appeals decision, and there is no federal jurisdiction over the breach of contract claims, then the pendent state claims should have survived. Under those circumstances, they could not logically be preempted by Sec. 301 since they would be based upon non 301 contracts.

The combined effect of the lower court's rulings is that a union member who has been subjected to violations of his union constitution by his union is left without any remedy whatsoever. Surely, this could not have been Congress' intention when it passed Sec. 301. At that time Congress was operating within the context of the widely held "contract theory" of union-member relationships. NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175, 192 (1967).

The court of appeals decision overlooked long standing Supreme Court precedent holding that union constitutions are contracts between the member and his union, the breach of which may give rise to a breach of contract claim. Int'l Assn. of Machinists v. Gonzales, 356 U.S. 617 (1958). In Gonzales, this Court recognized that the "contractual conception of the relation between a member and his union widely prevails in this country." Id, at

618. This view was reiterated in Journeymen at 621. [See also Local Union 13012, District 50, UMW v. Cikra, 86 O.App. 41, 90 N.E.2d 154 (1949)[5]; Jacobs v. Cook, 123 N.E.2d 276 (1953), aff'd 123 N.E.2d 282 (1954); and Price Field Pilots Club, Inc. v. Lee, 69 Abs. 216, 221 (1954) all of which recognize such a state claim.[6]]

5. This case was cited by this Court in Journeymen at 622.

6. It has also long been recognized by this Court, for example, that a union may bring an action in state court under a contract theory to enforce the payment of fines imposed against a member who violates the union constitution. NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175, 182 (1967). Petitioner acknowledges that there is, at least, a possible inconsistency between the Journeymen and Gonzales line of cases. To the extent that there is

(continued on next page bottom)

Violations of these contracts would also give rise to a state claim for intentional interference with contractual relations. Smith v. Klein 23 O.App.3d 146, 492 N.E.2d 401 (1985); Juhasz v. Quik Shops, Inc., 55 O.App.2d 51, 379 N.E.2d 235 (1977). Surely, if Petitioner had no remedy under Sec. 301 as to the violations of the union constitution, his state law claims prem ised upon the same violations should not have been dismissed.

A petition for a writ of certiorari should be granted to address this important federal question which was decided by the court of appeals in a way which is in conflict with the applicable decisions of this Court.

6. cont'd. such an inconsistency, this Court ought to resolve it in order to bring uniformity and predictability to this important area of labor law.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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December, 1990

APPENDIX

No. 88-4049

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GUY WOODDELL, JR.	)	ON APPEAL FROM
	)	THE UNITED STATES
Plaintiff-Appellant,	)	DISTRICT COURT
v.	)	FOR THE SOUTHERN
	)	DISTRICT OF OHIO
INTERNATIONAL BROTHER-	)	
HOOD OF ELECTRICAL	)	
WORKERS, LOCAL NO. 71;	)	(NOT RECOMMENDED
GREGORY SICKLES,	)	FOR FULL TEXT
Defendants-Appellees	)	PUBLICATION)

BEFORE: MARTIN, MILBURN and BOGGS, Circuit Judges.

PER CURIAM. Plaintiff-appellant Guy Wooddell, Jr. (Guy) appeals the lower court's grant of summary judgment for the defendants, as well as its refusal to allow a jury trial on one of its claims. Wooddell brought several claims under the federal labor laws, as well as pendent state law claims, against: Local 71 of the International Brotherhood of Electrical Workers ("the local" or "the union"), of which the plaintiff is a member; R.L.

"Buck" Wooddell (Buck), the president of the local and the plaintiff's brother; and Gregory Sickles, the business manager of the local and Buck's son-in-law. In light of the Supreme Court's holding in Breininger v. Sheet Metal Workers Local 6, 110 S.Ct. 424 (1989), we affirm in part, reverse in part, and remand the case for proceedings consistent with this opinion.

I

This dispute concerns the treatment of plaintiff by the local and its officers, Buck Wooddell and Sickles. The trouble between the relatives started in January 1986 when Guy opposed an announced union dues increase. In previous years, Guy had been opposed to the selection of Sickles as the business manager of the local and to the selection of other officers as well. After hearing of Guy's outspoken opposition to the dues increase, Buck telephoned Guy in order to discuss the

situation. Guy alleges that Buck told him that if he persisted in what Buck termed his false accusations against him and the union, he would be "finished" in the union. Buck recalls that Guy accused him of bribing an employer representative to rehire Sickles after a discharge and also states that Guy told him that there would an attorney "living in my (Buck's) house one of these days."

Shortly after this conversation, Buck filed union charges against Guy. Buck maintains that he told the local's recording secretary that these were not formal charges but that he wanted Guy to appear before the local's executive board in order to explain his disagreements with the local. On February 24, 1986, the local sent Guy a notice informing him that he was to appear before the board on March 14, 1986 and that he could bring witnesses and another member to act as his counsel

if he so wished. The charges, however, were not formally read at the regular monthly meeting of the board.

On March 14, 1986, Guy, after consulting an attorney, appeared before the board. He came without counsel. At the hearing, the charges were read. Afterward, Guy was asked if he were guilty of the charges. He said no. The two brothers then began shouting at each other, and Guy left. No decision was ever rendered on the charges, but the defendants did not agree to refrain from action against Guy until just before trial.

After this incident, Guy maintains that the local discriminated against him with respect to job referrals. The referral system operated by priority groups. The members were divided into four groups. Group I had the highest priority, meaning that those members would be referred first. In May 1986, Guy was dropped from

Group I to Group II. The union contends that this change was made because Guy had not worked the amount of hours over the preceding three years required to stay in Group I.

Before and after being dropped to Group II, Guy was not referred for jobs by the union from the end of January until July. The local's records show that it attempted to reach Guy by phone on July 25, 1986 and on July 28 in order to inform him of a referral. Guy claims that the local only started to refer him for jobs after he filed his complaint in federal court on July 25. On July 29, Sickles left a message with Guy's wife, but Guy did not return the call. In August 1986, after talking to Sickles, Guy accepted a job but quit after two days, claiming that the job was unsafe. Guy was referred for another job in October 1986. In February 1987, Sickles spoke to Guy's wife about another

job, but the local later discovered that Guy had accepted a different job in New Jersey.

On July 25, 1986, Guy filed this action. He made essentially six claims: (1) he was deprived of his right to free speech secured under Title I of the Labor Management Reporting and Disclosure Act (LMRDA) because the defendants retaliated against him for exercising his protected rights; (2) the union breached its contract in violation of Sec. 301 of the Labor Management Relations Act (LMRA) and state law; (3) the defendants intentionally interfered with his contractual relations in violation of state law; (4) he was deprived of his right to a full and fair hearing under the LMRDA; (5) the union breached its duty of fair representation in violation of Sec. 301; and (6) the defendants were guilty of the intentional infliction of emotional distress.

The defendants moved for summary judgment, and, in March 1988, the district court granted summary judgment to all of the defendants on the Sec. 301 breach of contract claims and to the individual defendants on the Sec. 301 fair representation claims. The case was then scheduled for trial in August 1988.

In July 1988, the defendants again moved for summary judgment on the remaining claims. In October 1988, after the submission of additional authorities by the defendants and a response by the plaintiff, the court issued an order granting summary judgment to the defendants on the rest of the claims. This appeal followed.

II

Guy first argues that the court below erred in holding that his LMRDA free speech claim concerning the defendants' alleged discrimination against him in job

referrals was within the jurisdiction of the National Labor Relations Act (NLRA), not the LMRDA. This discrimination took two forms: (1) pure discrimination in giving referrals and (2) the reclassification from Group I to II. Title I of the LMRDA, 29 U.S.C. Sec. 411, is termed the union members' bill of rights. It protects, among other rights, the right to participate equally in union elections and meetings and the right to express views and arguments. 29 U.S.C. Sec. 529 provides that no member can be disciplined for exercising his rights under the LMRDA.

The court held, on the authority of Breininger v. Sheet Metal Workers Local 6, 849 F.2d 997 (6th Cir. 1988) (per curiam), rev'd in part, 110 S.Ct. 424 (1989), that the alleged discrimination in referrals was not "discipline" under the LMRDA and therefore the plaintiff had no claim. A union member has an LMRDA claim if he can

demonstrate that he has been disciplined by his union for exercising one of the rights guaranteed in Title I of the act. Id. at 999. In Breininger we held: "It is well settled that union discrimination in job referrals is a matter within the exclusive jurisdiction of the NLRB." Id. at 998. "The LMRDA's bill of rights is intended to secure the rights of members in their status as union members and does not secure other rights related to a member's employment.... Hiring hall referrals are not a function of union membership since referrals are available to non-members as well as to members." Id. at 999 (citations omitted); but see Murphy v. Int'l Union of Operating Engineers, 774 F.2d 114 (6th Cir. 1985), cert. denied, 475 U.S. 1017 (1986).[1]

1. The court also held that plaintiff was required to exhaust his contractual remedies before he could bring his LMRDA claim as to the reclassification.

The Supreme Court reversed that holding in Breininger v. Sheet Metal Workers Local 6, 110 S.Ct. at 430-31. The Court refused to create a hiring hall exception to the general rule that a federal court has jurisdiction over a breach of the duty of fair representation claim, even if that breach might also constitute an unfair labor practice over which the NLRB has exclusive jurisdiction. Cf. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959). The district court's grant of summary judgment, on the ground that the NLRB has exclusive jurisdiction over claims alleging union discrimination in job referrals, was therefore in error.

Plaintiff's claim of discrimination in his reclassification cannot be defeated on the ground, relied upon by the district court, that plaintiff failed to exhaust his contractual remedies, as required by 29 U.S.C. Sec. 411 (a)(4). Section 411(a)

(4) recognizes an exhaustion requirement only for internal union remedies, not for remedies under a collective bargaining agreement. As there exists no exhaustion requirement for claims brought under the LMRDA, Guy is not barred from pursuing his free speech claim in federal court. He is entitled to reinstate his claims of discrimination in job referrals.

III

Guy next argues that the court below erred in rejecting his Sec. 301 contract claim. That claim is predicated upon an alleged violation of the union constitution and by-laws. The court held that a union member could not base a Sec. 301 claim against his union on the union constitution. The plaintiff disagrees.

The court held against the plaintiff on this issue, based on the authority of Trail v. International Brotherhood of Teamsters, 524 F.2d 961 (6th Cir. 1976).

In Trail, we held that a union member could not maintain a Sec. 301 breach of contract suit against the union based on an alleged violation of the union constitution. The plaintiff concedes that Trail defeats his claim. He argues, however, that the Supreme Court's decision in United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industries of the United States and Canada v. Local 334, 452 U.S. 615 (1981), has changed the law concerning this issue.

We disagree. It is true that the Court in Plumbing Industries held that a local union could sue the international union for a breach of the union constitution. The Court, however, explicitly left open the question of whether an individual could sue his local for a breach of the union constitution, holding that the Court "need not decide whether individual union members may bring suit on union constitu-

tion against a labor organization." Id. at 627 n.16. In addition, the Court, in allowing union organizations to sue each other, emphasized the special, contractual nature of the relationship between two organizations, in contrast to normal internal union governance. Id. at 626 ("There is an obvious and important difference between substantive regulation by the National Labor Relations Board of internal union governance of its membership, and enforcement by the federal courts of freely entered into agreements between separate labor organizations").

Since the Court has explicitly not resolved this issue, and the principles announced in Plumbing Industries do not require us to allow this kind of claim, we decline to abandon Trail and, thus, affirm the dismissal of the plaintiff's claim.

IV

Guy next argues that the court erred in dismissing his state law claims. He first argues that since the court below erred in holding that his state contract and interference with contract claims concerning the discriminatory referral system were subject to the exclusive jurisdiction of the NLRB, his state claims should have been considered. The plaintiff also argues that if Trail still operates to forbid a Sec. 301 suit based on the union constitution, he should be able to sue under state contract law for violation of the union constitution.

The plaintiff misconceives the relationship between state actions and federal labor law. Disputes between a union and its members are to be resolved not through contract actions but through the mechanisms set up in the LMRDA and the NLRA. Claims, for example, concerning the right

to a fair hearing guaranteed to union members are to be dealt with in the framework of an LMRDA suit.[2] Thus, despite the Court's ruling in Breininger that the NLRB does not have exclusive jurisdiction over referral system claims, such claims are still the subject of federal labor law, whether it be the NLRA or the LMRDA. State actions are not the proper vehicle for settling union-member disputes. As to any suit based on the constitution, it is exactly because the union constitution does not form a contract between the employee and the union that the state suit is not allowed. Indeed, if a contract we formed, then the suit would be preempted under Sec. 301. We thus affirm the dismissal of these claims.

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2. The district court found that even if a state law suit could be maintained for a breach of the fair hearing duty, judgment would still go to the defendants because the plaintiff was not damaged by any unfairness in his hearing.

V

The plaintiff next argues that he was deprived of a full and fair hearing in violation of his rights under the LMRDA when he was hauled into the hearing by Buck. The district court held that the plaintiff was not damaged by the charges or the hearing, and, therefore, there was no claim. Guy contends that he was damaged by the allegedly unfair hearing. He had to prepare for and attend the hearing, and afterwards the charges were hanging over his head for over two years. He also argues that the controversy is still a live one because he may be entitled to attorney's fees for the work involved in getting the union to drop the charges.

Title I of LMRDA protects a union member from being fined, suspended, expelled or disciplined without receiving a fair hearing. 29 U.S.C. Sec. 411(a) (5). We hold that because the plaintiff was never

fined, suspended, or disciplined, no hearing was necessary. The charges were only filed; there was no discipline imposed. The mere filing of charges and scheduling of a hearing does not constitute discipline under the act. Rivera v. Feinstein 636 F. Supp. 159 (S.D. N.Y. 1986). Because nothing came of these charges, the plaintiff's LMRDA rights were never challenged. Section 411 (a) (5) refers to the procedure that must be used if one is disciplined; it does not refer to the hearing procedures to be used if charges merely are filed. The plaintiff's rights were simply not violated. We therefore affirm the district court on this issue.

VI

Guy argues that the court erroneously dismissed his duty of fair representation claim under Sec. 301. The contracts between the involved contractors' associations and the local provide that

the union will make non-discriminatory referrals. The plaintiff argues that the union breached these contracts by discriminating against him and thus not fairly representing him.

The defendants argue that a Sec. 301 fair representation claim can only be brought in tandem with an allegation that the employer violated the contract. Guy argues that a plaintiff need not bring a duty of fair representation claim as a typical hybrid Sec. 301 claim. Although Guy's legal proposition has now been vindicated by the Supreme Court's decision in Breininger, we hold that this proposition is not relevant to a resolution of this issue.

Each of the collective bargaining agreements that the defendant local is alleged to have violated established an appeals committee consisting of three members: one from the union, one from the

contractors' association, and one from the public. One of the contracts, for example, provides that "[t]he appeals committee shall have the power to make a final and binding decision on any such complaint which shall be complied with by the local union." It is undisputed that the plaintiff has made no attempt to exhaust these remedies. Therefore, his failure to exhaust operates as a bar to his claim at this time.

VII

The plaintiff's last contention is that the court below erred in ruling that he was not entitled to a jury trial on his LMRDA claim. He concedes that McGraw v. United Assoc. of Journeymen, 341 F.2d 705 (6th Cir. 1965), is contrary to his position. He argues, however, that the holding is wrong and should be reconsidered. He points to Hildebrand v. Bd. of Trustees

of Mich. St. Univ., 607 F.2d 705, 708 (6th Cir. 1979), in which we held:

> the chief focus to be made when determining whether a jury trial right exists is the nature of the relief sought. If the remedy to be sought is injunctive relief and/or back pay, no jury trial right attaches. In the ordinary case, if the relief sought includes compensatory and/or punitive damages, then there does exist a right to trial by jury.

The plaintiff argues that the general principles stated in Hildebrand, in the context of a retaliatory discharge action, should lead the court to modify McGraw and hold that he is entitled to a jury trial. As Hildebrand does not concern LMRDA claims, we see no reason to disturb McGraw. Although the district court erred in granting summary judgment for the union on the LMRDA claims, Guy is not entitled to a jury trial on those claims.

The case is **REMANDED** for a consideration of Guy's free speech claims. In all

other respects, the judgment of the district court is **AFFIRMED**.

ISSUED AS MANDATE: September 12, 1990
COSTS: None

No. 88-4049

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GUY WOODDELL, JR. Plaintiff-Appellant, v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 71; GREGORY SICKLES, Defendants-Appellees.	)	ORDER

BEFORE: MARTIN, MILBURN and BOGGS, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were

fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Guy Woodell, Jr.,

Plaintiff

-vs-

International Brotherhood of Electrical Workers, Local Union No. 71, et al.

Defendants.

Case No. C-2-86-0903

Judge Graham

MEMORANDUM AND ORDER

The plaintiff, Guy Woodell, Jr., is a member of defendant International Brotherhood of Electrical Workers, Local Union No. 71 ("the Union"). Defendant R. C. Woodell is the president of the Local 71 and defendant Gregory Sickles is the business manager of the local. Plaintiff alleges that in January, 1986, he expressed opposition to a proposed by-law amendment and criticized the appointment of defendant Sickles as business manager. As a result of his actions, plaintiff was

allegedly subjected to discipline and discrimination in job referrals.

Plaintiff subsequently filed an action alleging deprivation of his right to free speech in violation of Title I of the Labor Management Reporting and disclosure Act (LMRDA), 29 U.S.C. Secs. 411, 412, and 529; deprivation of his right to a full and fair hearing in violation of the LMRDA; breach of a labor contract in violation of Sec. 301 of the Labor Management Relations Act, 29 U.S.C. Sec. 185, and Ohio law; breach of the duty of fair representation in violation of Sec. 301; intentional interference with contractual relations; and intentional infliction of emotional distress.

This case is now before the Court on defendants' motion for summary judgment under Fed. R. Civ.P. 56 or dismissal under Rule 12. Defendants first argue that this Court lacks jurisdiction over plaintiff's

Sec. 301 claims because he has failed to exhaust his remedies under his collective bargaining agreement and union constitution. Defendants rely on Republic Steel Corp. v. Maddox, 379 U.S. 650 (1979), which held that "[a]s a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress." Id. at 652 (emphasis in original).

Plaintiff concedes that he has not attempted to use the grievance and arbitration procedure provided for in his union's contract with the electrical contractors' association. However, plaintiff contends that the requirement of exhausting contractual remedies does not apply in this case since he is not making any claim against the electrical contractors. An

examination of the collective bargaining agreement reveals that it provides a procedure for resolving disputes between the parties, i.e. the union and the contractors' association. Since there is no dispute with the contractors in this case, such a procedure is inapplicable. See Automobile Transport, Inc. v. Ferdnance, 420 F.Supp. 75 (E.D. Mich. 1976) (holding arbitration procedure inapplicable to claim against union).

Defendants also contend that this Court lacks jurisdiction over the Sec. 301 claims because plaintiff has failed to exhaust the internal remedies established by the union constitution. Defendants rely on Clayton v. United Automobile Workers, 451 U.S. 679 (1981), which held that union members are generally required to exhaust their internal union remedies before bringing a Sec. 301 suit for the breach of the union's duty of fair representation.

The Clayton Court noted that exhaustion of internal remedies should be excused in certain circumstances. The Court stated that at least three factors are relevant to this determination:

> First, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under Sec. 301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim.

451 U.S. at 689. Accord, Monroe v. United Automobile Workers, 723 F.2d 22, 24-5 (6th Cir. 1983).

In the instant case, the constitution of the International Brotherhood of Electrical Workers provides for appeals to the International Vice President responsible for a member's district. Local 71 is in the Fourth District and B.G. Williamson is

the Vice President assigned to that district. There is no evidence that Williamson is hostile toward the plaintiff. Therefore, the first Clayton exception is not applicable.

As to the second exception, it is unclear whether an appeal would be adequate to provide plaintiff with the relief he seeks. Plaintiff is seeking, inter alia, wages and fringe benefits allegedly lost as a result of unlawful discrimination in job referrals. Article XXVII of the union constitution, which contains the appellate procedure, applies to disciplinary actions taken by a trial board at the local level. In the instant case, however, the alleged discrimination in job referrals was not the result of a formal decision by a trial board. Thus, Article XXVII does not appear to be applicable to this dispute.

Even assuming arguendo that an appeal to Vice President Williamson could provide

plaintiff with complete relief, the use of that procedure is barred by the trial board's failure to render an official decision. While the plaintiff was summoned to a hearing before that board on March 14, 1986, the board has not yet issued a decision which can be appealed to the Vice President. Therefore, plaintiff's use of the appellate procedure would unreasonably delay his opportunity to seek judicial redress. Accordingly, the Court concludes that exhaustion of internal remedies was not required in this case.

Similarly, defendants argue that plaintiff's LMRDA claims are barred by his failure to exhaust his internal union remedies. 29 U.S.C. Sec. 411(a)(4) provides that a union member "may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative pro-

ceedings against such organizations or any officer thereof...." In this case, the plaintiff attended the union trial on March 14, 1986 and did not file his original complaint until July 25, 1986. Thus, plaintiff did attempt to use his union remedies for more than the four months required by Sec. 411(a)(4). Moreover, as discussed above, those remedies would be inadequate in this case.

Defendants next contend that the individual defendants cannot be held liable under Sec. 301. This contention is supported by the weight of authority. See, e.g. Peterson v. Kennedy, 771 F.2d 1244, 1256-57 (9th Cir. 1985); Suwanchai v. International Brotherhood of Electrical Workers, 528 F.Supp. 851, 861-62 (D. N.H. 1981). Moreover, union officers cannot be held liable under a state law claim that is essentially the same as a Sec. 301 claim. Peterson, 771 F.2d at 1257; Univer-

sal Communications Corporation v. Burns, 449 F.2d 691, 693-94 (5th Cir. 1971). Accordingly, the breach of contract claims against defendants Woodell and Sickles must be dismissed, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief may be granted.

However, the individual defendants may be liable under the LMRDA. Aguirre v. Automotive Teamsters, 633 F.2d 168, 172 (9th Cir. 1980); Rosario v. Amalgamated Ladies Garment Cutters Union, Local 10, 605 F.2d 1228, 1246 (2d Cir., 1979), cert. denied, 446 U.S. 919 (1980); Waring v. International Longshoremen's Association, Local 1414, 665 F.Supp. 1576 (S.D. Ga. 1987). As the Second Circuit has noted, "[g]iven the Act's intent to curb the power of overweening union officials, this is clearly the right result." Morissey v. National Maritime Union of America, 544 F.2d 19, 24 (2d Cir. 1976).

Defendants' final argument is that a union member may not bring a Sec. 301 action based upon a violation of his union's constitution. Defendants rely on Trail v. International Brotherhood of Teamsters, 542 F.2d 961 (6th Cir. 1976), in which the court held that Congress did not intend Sec. 301 to be a vehicle for resolving internal union disputes. Plaintiff contends that Trail is no longer controlling in light of the Supreme Court's decision in United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada v. Local 334, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, 452 U.S. 615 (1981) (Journeymen).

In Journeymen, the Court held that "a union constitution is a 'contract' within the plain meaning of Sec. 301(a)...." Id.

at 622. The plaintiff in that case was a union local which alleged that its parent international union had violated the international's constitution. The Supreme Court held that the federal courts have jurisdiction under Sec. 301 to resolve such disputes. However, the Court expressly left open the issue of whether individual union members could bring suit for violation of a union constitution. Id. at 627, n. 16.

In Lewis v. International Brotherhood of Teamsters, Local 771, 886 F.2d 1310 (3d Cir. 1987), the court answered that question in the affirmative. The Lewis court stated that the reasoning of the Trail decision had been undercut by the Journeymen decision. Other post-Journeymen decisions which have allowed suits by individual members based on union constitutions include Kinney v. International Brotherhood of Electrical Workers, 669

F.2d 1222 (9th Cir. 1982), Legutko v. Local 816, International Brotherhood of Teamsters, 606 F.Supp. 352 (E.D. N.Y. 1985), and Doby v. Safeway Stores, Inc., 523 F.Supp. 1162 (E.D. Va. 1981).

This Court, however, has previously held that it is still bound by the Trail decision. Werner v. McLean Trucking Co., 627 F.Supp. 203 (S.D. Ohio 1985) (Porter, J.). Accord, Frenza v. Sheet Metal Workers' International Association, 567 F. Supp. 580 (E.D. Mich. 1983). Moreover, Congress has provided adequate remedies for aggrieved union members in Title I of the LMRDA, under which the plaintiff has stated a claim. Accordingly, plaintiff's Sec. 301 claim for breach of the union constitution must be dismissed, pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction. As previously discussed, this holding cannot be circumvented through a purported state law claim

and thus plaintiff's common law claim for breach of contract must also be dismissed.

In summary, plaintiff's claims against all defendants under Sec. 301 of LMRA and state law for breach of the union constitution are DISMISSED. Plaintiff's claims against defendants Woodell and Sickles for breach of the duty of fair representation are also DISMISSED. In all other respects, defendants' motion for summary judgment or dismissal is DENIED.

Therefore, plaintiff's claims for deprivation of his right of free speech, deprivation of his right to a fair hearing, intentional interference with contractual relations, and intentional infliction of emotional distress remain for resolution at trial.

It is so ORDERED.

JAMES L. GRAHAM, United States District Judge

DATE: March 21, 1988

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

- - -

GUY WOODDELL, JR.,

Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 71, et al.,

Defendants.

Case No. C-2-86-0903

- - -

EXCERPT TRANSCRIPT

of proceedings before The Honorable James L. Graham, Judge, on Monday, August 29, 1988, at 8:00 a.m.

- - -

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On behalf of the Defendants.

- - -

Monday Morning Session,
August 29, 1988.

- - -

Thereupon, the following proceedings were had in chambers out of the presence and hearing of the jury:

....

THE COURT: Counsel, let me give you the benefit of my rulings on the remaining issues.

On the question of whether or not the Plaintiff is entitled to a jury trial, under the LMRDA, the Defendants filed a motion to strike a jury demand.

I have reviewed the briefs and have extensively considered these two issues as they relate to both the LMRDA and Section 301.

Now, in regard to the right to jury trial under the LMRDA, the Court feels bound by the decision of the Sixth Circuit in McGraw v. United Association of Journeymen, 341 Fed 2d 705, although the

Court considers it very likely that the Sixth Circuit will reconsider and reverse McGraw if presented with the opportunity to do so.

And for that reason, the Court had notified counsel that it intended to impanel an advisory jury in this case. Nevertheless, the Defendants' motion to strike the jury demand is granted with respect to the LMRDA claim because under McGraw Plaintiff does not have a right to a jury trial.

Now, however, under the Section 301 claim, the Court finds that the Plaintiff is entitled to a jury trial and agrees with the reasoning of Senior Judge Contie in the case of Wood v. International Brotherhood of Teamsters 807 Fed 2d 493.

And since the Section 301 claim asserted here is a breach of contract claim, the Court concludes that it is triable to a jury as a matter of right.

Now, on the issue of punitive damages, the Court finds that they are available under the LMRDA upon a showing of actual malice or reckless or wanton indifference, and the Court relies on the case of Shimman v. Frank 625 Fed 2d 80.

However, the Court concludes that punitive damages are not available under Section 301. And in reaching this conclusion, the Court relies on International Brotherhood v. Foust 442 U.S. 42 and Farmer v. ARA Services, Inc., 660 Fed 2d 1096.

Counsel, I believe that takes care of all of the issues that have been raised, again, with the exception of the Defendants' pre-emption argument, which the Court wants to have additional evidence on.

....

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Guy Wooddell, Jr.,

Plaintiff,

-vs-

International Brotherhood of Electrical Workers, Local Union No. 71, et al.

Defendants.

Case No. C-2-86-0903

JUDGE GRAHAM

ORDER

This case arises out of an intra-union dispute which is complicated by an intra-family dispute between the plaintiff union member and his brother, the union president. Plaintiff is a member of defendant International Brotherhood of Electrical Workers, Local Union 71 ("Local 71"). Defendant R. L. Wooddell is the president of Local 71 and defendant Gregory Sickles is the business manager. Plaintiff is the younger brother of defendant Wooddell and Sickles is the son-in-law of the elder Wooddell.

Plaintiff alleges that in January, 1986 he expressed his opposition to a proposed amendment to the by-laws of Local 71 and criticized the appointment of defendant Sickles as business manager. Plaintiff further alleges that as a result, on January 28, 1986 his brother filed internal union charges against him, claiming that he had made false accusations against him and Mr. Sickles and that this violated a provision of the Constitution of the International Union. Plaintiff was directed to appear before the Executive Board of Local 71 on March 14, 1986 to answer these charges. Plaintiff did appear at the meeting and denied that he was guilty of the alleged offense. No formal disposition of the charges was ever made and defendants contend that they were "informal" and were not intended to result in punishment of the plaintiff. Plaintiff asserts, however, that nothing prevents the defendants from

entering a finding of guilty and imposing punishment at any time and that the charges continue to represent a threat of harm. Plaintiff claims that the charges were improperly commenced, that they were filed in retaliation for his exercise of his rights of freedom of speech guaranteed under the union constitution, and that he did not receive a fair hearing. Plaintiff claims that he did not receive a fair hearing because his brother not only filed the charges, but presided over the hearing in his capacity as president of Local 71.

Plaintiff further claims that as a result of speaking out against the proposed by-law amendment and the appointment of defendant Sickles as business manager, he was subjected to retaliation in the form of manipulation of the union's job referral system, resulting in loss of employment. Local 71 operates a hiring hall in which it refers members and non-members to

prospective employers. This is a first in, first out system in which the applicants for employment are classified into four subgroups, denominated groups I through IV, depending upon various criteria including years of experience in the trade, residency in the geographical area constituting the labor market and other factors. All applicants in Group I must be referred out before proceeding to the applicants in Group II and so on with Groups III and IV.

Plaintiff asserts two distinct claims of alleged discrimination by the defendants in the operation of the job referral plan. First, he claims that the defendants did not refer him out for jobs when his name came up on the list. In his amended complaint, plaintiff alleged that this form of economic discrimination began on January 27, 1986. Defendant denies that such discrimination occurred. The second element of plaintiff's claim of economic

discrimination by improper operation of the job referral system is his claim that on May 29, 1986, defendants improperly transferred him from Group I to Group II. Defendants admit that this occurred but allege that it was a proper reclassification because plaintiff had not worked the required number of hours during the preceding three years in order to qualify for a position in Group I. Plaintiff disputes this and claims that he did have the requisite number of hours.

Based on the above facts, plaintiff asserted a variety of claims including interference with and retaliation for the exercise of his right of free speech in violation of Title I of the Labor Management Reporting and Disclosure Act (LMRDA) 29 U.S.C. Secs. 411, 412, and 529; deprivation of his right to a full and fair hearing in violation of the LMRDA; breach of a labor contract in violation of Sec.

301 of the Labor Management Relations Act (LMRA) 29 U.S.C. Sec. 185 and Ohio law; breach of the duty of fair representation in violation of Sec. 301; intentional interference with contractual relations; and intentional infliction of emotional distress.

Plaintiff's breach of contract claims have two branches, first, plaintiff claims that the actions of the defendants complained of constituted a breach of the Constitution of the International Union and the by-laws of Local 71 and second, that their actions constituted a breach of the referral provisions of the collective bargaining agreements entered into between Local 71 and various contractors.

In a memorandum and order filed on March 21, 1988, the Court granted partial summary judgment to the defendants. The Court dismissed plaintiff's claims under Sec. 301 of the LMRA and state law for

breach of the union constitution, citing Trail v. International Brotherhood of Teamsters, 542 F.2d 961 (6th Cir. 1976) and recent district court decisions following Trail. The Court further reasoned that inasmuch as plaintiff's claims arose out of alleged retaliation for the exercise of his rights of free speech, matters specifically covered by the LMRDA, he had an adequate remedy under that act for his breach of contract claims based upon alleged violations of the constitution and by-laws of the unions. See 29 U.S.C. Sec.s 411(a)(1), (2), (5); 529. At that time, the Court also granted summary judgment in favor of individual defendants Wooddell and Sickles with respect to the claims asserted against them under Sec. 301 since the weight of authority holds that individual defendants cannot be held liable under that statute.

The Court then scheduled this matter for trial on August 29, 1988. On July 19, 1988, defendants filed a second motion for summary judgment. The parties appeared for trial on August 29, 1988, and the Court thereupon made oral rulings on the issues raised by defendants' second motion for summary judgment and proceeded to conduct a hearing pursuant to Rule 56(d) on the issue of whether or not defendant was entitled to summary judgment on the grounds that plaintiff's claims were barred by the doctrine of collateral estoppel. The Court concluded that plaintiff was not collaterally estopped from pursuing his claims of discriminatory job referrals and improper reclassification from Group I to Group II in the referral system.

In ruling on defendants' motion for summary judgment, the Court held that with respect to plaintiff's claims based upon

his reclassification from Group I to Group II of the referral system, plaintiff's claims were barred by his failure to exhaust the internal contractual remedies for such a complaint. Each of the collective bargaining agreements established an appeals committee consisting of a member appointed by the union, a member appointed by the employer or employer association, and a public member appointed by both of the other members. The function of the committee "was to consider any complaint of any employer or applicant for employment arising out of the administration of the contractual provisions governing referrals." The appeals committee was empowered to make a decision which was binding on the local union. The agreement between the local union and the Greater Cleveland Chapter of the National Electrical Contractors Association contained the following provision:

> An appeals committee is hereby established composed of one member appointed by the union, one member appointed by the employer or by the association, as the case may be, and a public member appointed by both of these members. It shall be the function of the appeals committee to consider any complaint of any employer or applicant for employment arising out of the administration of the local union of Sections 3 to 7 of this addendum. [Sections 3 through 7 set forth the referral procedure, including the classification of applicants into groups I through IV and the conditions for those classifications]. The appeals committee shall have the power to make a final and binding decision on any such complaint which shall be complied with by the local union. The appeals committee is authorized to issue procedural rules for the conduct of its business, but it is not authorized to add to, subtract from, or modify any provisions of this addendum and its decisions shall be in accord with this addendum.

The Court concluded that this appeal procedure provided the plaintiff with a speedy and adequate remedy for his grievances over classification. Whether plaintiff was properly reclassified could have readily been determined by records

maintained by the union and the employers, or by reference to the plaintiff's own records. This dispute could have been promptly resolved by the appeals committee, a fair and impartial tribunal consisting of representatives of both the union and the employer, as well as a public member. The committee's decision would have been binding on the union. It is undisputed, however, that plaintiff made no attempt to utilize this procedure. Therefore, he is precluded from raising these claims for the first time in this Court. The requirement of exhaustion of contractual remedies bars plaintiff's claims under the LMRA. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563, 91 LRRM 269 (1967); Dill v. Greyhound Corp., 435 F.2d 231, 237 (6th Cir. 1970), cert. denied, 402 U.S. 952 (1971); Bsharah v. Eltra

Corp., 394 F2d 502, 503 (6th Cir. 1968); Woody v. Sterling Aluminum Products, Inc., 365 F.2d 448, 456 (8th Cir. 1966), cert. denied, 386 U.S. 957, (1967). Likewise, plaintiff's failure to exhaust his contractual remedy bars his claims under the LMRDA. 29 U.S.C. 411(a)(4) provides:

> No labor organization shall limit the right of any member thereof to institute an action in any court ... Provided that such member shall be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal ... proceedings against such organization or any officer thereof.

The exhaustion requirement has been upheld in Bise v. International Electrical Workers, 618 F.2d 1299 (9th Cir. 1979), cert. denied, 449 U.S. 904 (1980); McCraw v. United Association, 341 F.2d 705, 711 (6th Cir. 1965); Chapa v. Local 18, 737 F.2d 929 (11th Cir. 1984); Detroy v. American Guild of Variety Artist, 286 F.2d 75 (2d Cir.), cert. denied, 366 U.S. 929 (1961);

Winter v. Local 639, 569 F.2d 146 (D.C. Cir. 1977).

The Court concluded, however, that although this contractual remedy would be fully adequate for plaintiff's claim of improper reclassification from Group I to Group II, it would not be an effective remedy for his claims of discrimination and manipulation of the referral process itself. The appeals committee does not have the authority to award damages for lost wages and it would be difficult for the plaintiff to effectively utilize the appeal machinery to remedy a pattern of daily discrimination in job referrals. Plaintiff would have to constantly monitor the activities of the business agent in order to detect discrimination and the vindication of his rights under the referral system might require the filing of multiple appeals. Accordingly the Court concluded that plaintiff was not barred

from pursuing his claims of discrimination in job referrals. In retrospect the Court harbors some doubt as to the wisdom of this distinction and feels that a good argument can be made that the contractual remedy is equally adequate to remedy claims of discrimination in referrals. However, this issue has been mooted by subsequent developments, see discussion of Breininger v. Sheet Metal Workers Local 6, infra.

When the Court announced its decision, plaintiff's counsel indicated his desire to conditionally dismiss plaintiff's claims based upon discriminatory job referrals. Counsel stipulated that plaintiff did not sign the referral list indicating that he desired employment until March 11, 1986, a little more than two and one-half months before his reclassification to Group II on May 29, 1986. Plaintiff indicated that he would have difficulty

proving significant damages during this interval and that his main damage claim rested upon his reclassification from Group I to Group II. The parties then agreed that plaintiff would conditionally dismiss his claim for discrimination in referrals with the understanding that the Court would make appropriate findings and an order under Rule 54(b) Fed. R. Civ. P., permitting plaintiff to appeal the Court's rulings on plaintiff's remaining claims with the understanding that plaintiff would be permitted to reinstate his claims of discrimination in job referrals only in the event of a reversal of the Court's dismissal of his claims arising out of his reclassification from Group I to Group II.

With regard to plaintiff's claims that he had been subjected to an improper disciplinary proceeding in violation of the LMRDA, the parties entered into a stipulation that the union would take no further

action against the plaintiff with respect to the charges referred to in the notice of February 24, 1986 and that those charges would be considered dismissed. On the basis of this stipulation, the Court found that the charges in question presented no further threat to the plaintiff which would justify injunctive relief and that plaintiff had shown no evidence of actual damages as a result of the filing of those charges or the hearing of those charges at the executive board meeting of March 14, 1986. Accordingly, the court found that defendants were entitled to summary judgment on plaintiff's claims that he was subjected to improper charges and was deprived of his right to a full and fair hearing in violation of the LMRDA or in violation of the constitution of the International Brotherhood of Electrical Workers or the by-laws of Local 71.

In his memorandum contra defendants' second motion for summary judgment, plaintiff indicated that he was withdrawing his claim for intentional infliction of emotional distress. Id. at 34.

On September 6, 1988, before the Court had entered an order confirming its rulings of August 29th, 1988, defendants' counsel brought to the Court's attention the decision of the Sixth Circuit in Breininger v. Sheet Metal Workers Local 6, 841 F.2d 1125, 128 LRRM 2845 (1988). On September 9, 1988, defendants filed a motion for leave to file additional authorities or for reconsideration based upon the Breininger decision. In Breininger, the court held that union discrimination in job referrals is a matter within the exclusive jurisdiction of the NLRB:

> [1] It is of no consequence that the union's allegedly discriminatory referral policies are described as a breach of the NLRA's duty of fair representation or as a violation of

> the LMRDA's bill of rights. "It is not the label affixed to the cause of action ... that controls the determination." Borden, 373 U.S. at 698. The case law developed subsequent to Borden and Hardeman forecloses either theory.
>
> [2] Circuit courts have consistently held that NLRA fair representation claims must be brought before the board.

The Court further held that discrimination in job referrals did not constitute "discipline" within the meaning of NLRA, 29 U.S.C. Sec. 411(a)(5):

> ... The LMRDA's bill of rights is intended to secure the rights of members in their status as union members and does not secure other rights related to a member's employment ... Hiring hall referrals are not a function of union membership since referrals are available to non-members, as well as to members .... Discrimination in the referral system, because it does not breach the employee's union membership rights, does not constitute "discipline" within the meaning of LMRDA.

Breininger supplies an additional ground for the Court's order of summary judgment on plaintiff's claims arising out of his reclassification from Group I to

Group II of the referral system, and Breininger furnishes a basis for final judgment in favor of the defendants on plaintiff's claims arising out of alleged discrimination in the referral system. Accordingly, the Court will modify its oral decision accepting plaintiff's conditional dismissal of those claims and instead the Court will enter summary judgment on those claims on the authority of Breininger.

Plaintiff has asserted claims under state law for breach of contract and for intentional interference with contractual rights. In each instance, he is relying on provisions of the Constitution of the International Union and the by-laws of the Local Union. Insofar as these claims relate to provisions guaranteeing plaintiff a fair and impartial trial, defendants are entitled to judgment on the same grounds as respects plaintiff's

claims under the LMRA, 29 U.S.C. Sec. 411(a)(5). Plaintiff sustained no damages as a result of the alleged unfair hearing and the charges filed against him have been concluded in his favor. With respect to claims arising out of the provisions of the by-laws of Local 71, which require the business manager to devise a "practical and fair" means of distributing available jobs to qualified members, plaintiff's state law claims are preempted by the NLRB act and are within the exclusive jurisdiction of the NLRB. See International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO v. Hardeman, 401 U.S. 233, 239-40 (1970); Local 100, United Association of Journeymen & Apprentices v. Borden, 373 U.S. 690, 694-96 (1963). Furthermore, the Court has held that insofar as those claims relate to plaintiff's reclassification from Group I to Group II

of the referral system, they are barred by his failure to exhaust his contractual remedies.

Insofar as plaintiff's contract claims relate to a requirement that the local union abide by the collective bargaining agreements entered into with employers, the claims are likewise grounded on alleged discrimination in referrals and reclassification from Group I to Group II within the referral system. Plaintiff claims that the Constitution of the International Union requires the Local Union to "live up to all collective bargaining agreements." Therefore, plaintiff would appear to be claiming that this provision of the Constitution of the International Union is a contract binding on the local union and that he has a cause of action for breach of that contract. Plaintiff further claims that he has a cause of action against the local union for inten-

tional interference with the collective bargaining agreement vis-a-vis his claims of discriminatory referral and improper reclassification. Again, since these claims relate only to alleged discrimination in the job referral system, they are preempted by the NLRB act and are subject to the exclusive jurisdiction of the NLRB and plaintiff has no claims under state law.

In light of the foregoing, defendants' motion for summary judgment is well taken in all of its branches and the clerk shall enter final judgment in favor of the defendants, dismissing all of the plaintiff's claims with prejudice with costs to plaintiff.

It is so ORDERED.

JAMES L. GRAHAM, United States District Judge

DATE: October 19, 1988